

1 IN THE GRAND COURT OF THE CAYMAN ISLANDS
2 CRIMINAL SIDE
3

4 SCA NO: #0013/2019
5

6
7 XOTCHILT ANN WATLER
8

9 v.
10

11 THE QUEEN
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16 **Appearances:**

17 **Mr. Oliver Grimwood of Barton Attorneys for**
18 **the Appellant**

19 **Mrs. Candia James-Malcolm for the**
20 **Respondent/Crown**

21 **Before:**

Dame Linda Dobbs (Acting Judge)

22 **Hearing date:**

23 **27th July 2020**
24
25

26 **HEADNOTE**

27 *Criminal Law – Appeal from the Summary Court against Sentence imposed by*
28 *Magistrate – Charge: Possession of Cocaine with intent to supply – Aggravating*
29 *and Mitigating factors to be considered.*
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32 **JUDGMENT**
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1 **INTRODUCTION**

2 1. The Appellant, Miss Xotchilt Watler pleaded guilty to a number of offences. The
3 subject matter of the appeal however relates to her plea on the 25th of October 2018 to
4 one count of Possession of Cocaine with intent to supply contrary to s.3(2) of the
5 *Misuse of Drugs Law* (2014 Revision), the date of the offence being 23rd of July 2018
6 and the amount being 4.5g of cocaine.

7 2. The Appellant was sentenced on the 25th of June 2019. She received a total of 6 years’
8 and 6 months’ imprisonment, 6 years’ imprisonment for the offence the subject matter
9 of this appeal.

10 **THE FACTS**

11 3. The facts can be stated quite briefly. On 23rd July 2018, a search warrant was executed
12 at the home of the Appellant. During the search police recovered several small bags of
13 cocaine, some ganja and cell phones. Also recovered were a grinder, scale, cash in the
14 sum of \$1,799 and notebooks/documents which appeared to be records of transactions.
15 The Appellant was arrested at the scene and admitted to using cocaine. In her first
16 interview, the Appellant admitted use of cocaine but denied supplying. In her second
17 interview she admitted supplying cocaine but denied use. She was charged on 25th July
18 2018.

19 **THE MAGISTRATE’S APPROACH TO SENTENCE**

20 4. The Magistrate took a starting point of 8 years in line with the *Statement on Tariffs*
21 *and Guidelines for Sentencing 2002* for a first offence. There is no complaint made
22 of the starting point.



1 5. The Magistrate found the following aggravating features:

2 (a) The offence was committed on bail;

3 (b) Attempts were made to conceal the drugs when police raided her home
4 (the appellant put the packets of cocaine in her mouth);

5 (c) The appellant as carrying out operations with children residing in her
6 home;

7 (d) She knew of the purity;

8 (e) The appellant knew of the penalties involved.

9 6. As for mitigating circumstances, the Magistrate found the following:

10 (a) The Appellant had no previous convictions;

11 (b) She had taken steps to address her need for intervention;

12 (c) She was the primary caretaker of two young children;

13 (d) She had a traumatic young life.

14 7. The Learned Magistrate also set out extracts from Dr Lockhart's medical report and the
15 Social Inquiry Report (SIR). The Magistrate noted that Appellant was able to hold
16 down a job and expressed the view that the Appellant was a calculating person.

17



1 8. The Learned Magistrate also gave consideration to the fact that the Appellant was the
2 primary carer of her children and quoted the case of *R v. Nethersole*¹ which deals with
3 the balancing act between the interests of society in the proper enforcement of the
4 criminal law, and the rights of the child.

5 9. The Learned Magistrate at paragraph 17 of the sentencing remarks found that:

6 *“the aggravating factors are serious and cancel out the mitigating factors and that*
7 *the appropriate sentencing starting point for this matter is 8 years”*

8

9 10. As for the plea of guilty, she was not prepared to give full credit and gave credit of
10 25%. No point is taken in relation to the percentage reduction for plea.

11 **THE APPELLANT’S SUBMISSIONS**

12 11. The first submission is that the Learned Magistrate was in error when she concluded
13 that the aggravating and mitigating features cancel each other out, and secondly, that
14 she gave insufficient weight to the powerful personal mitigation.

15 12. The Appellant submits that the offence being committed whilst on bail is the primary
16 aggravating feature. It is noted that this is the only aggravating feature noted by the
17 sentencing Magistrate that is contained within the *Sentencing Council of England and*
18 *Wales’s Definitive Guidelines.*

19 13. The Appellant suggesting knowledge of purity could be interpreted in many ways -
20 with one possibility being that she was close to the original source of the creation of
21 the drug. This seems unlikely given she is a young single mother residing in the



¹ 2015 EWCA Crim 217



Cayman Islands. It is submitted that it (commenting on the purity) was mere “puff” (from the Appellant) in advertising to a customer to ensure a sale.

14. However, importantly, it is noted that there was no expert analysis of the cocaine to provide its purity, and so there is nothing to suggest whether the Appellant was even speaking from any position of knowledge. Without expert analysis, this should not be an aggravating factor.

15. The Appellant contends that the Learned Magistrate failed to give sufficient weight to the powerful personal mitigation of the Appellant, in particular, insofar as it relates to three factors:

- a. The traumatic abuse the Appellant suffered as a child, and its ongoing effects;
- b. The abuse the Appellant’s eldest daughter suffered as a young child;
- c. The fact the Appellant was sole carer for her children.

16. Counsel for the Appellant clarified that it was not suggested in the lower Court, nor advanced in these submissions that the authorities of *Petherick*² or of *Nethersole*³ are only relevant when the offender is on ‘the cusp of custody’, nor that being a single parent is a ‘trump card’ that prevents a custodial term being imposed - as appeared to be the Magistrate’s perception of the submissions.

17. The authorities were relied on to make the point that the Court must give detailed consideration to the effect of imprisonment on the individual and her immediate dependant family. The ongoing effects of imprisonment upon the Appellant and her young family were addressed in reports before the lower Court, and since that time Dr.

² [2012] EWCA 2014

³ [2015] EWCA Crim 217

1 Lockhart has provided an updated report (dated the 23rd of September 2019) addressing
2 the severe effects the custodial term is having upon the Appellant and her children.

3 18. The court was reminded that the Appellant is a single mother, who suffered sexual
4 abuse as a child. This abuse has not been properly addressed and it has led to poor
5 decision making as an adult. It is those terrible choices as to how to support herself
6 and her children that brought her before the Court. The childhood trauma that was
7 visited upon the Appellant, was also suffered by her daughter. The reports note that as
8 a result of shared experience, the Appellant is best placed to assist her daughter in
9 addressing what she went through.

10 19. The separation that results from a custodial term will always be felt more acutely by
11 the primary caregiver and child. This is even more so in the present situation, and so,
12 the sanction of prison acts as a greater punishment in this case. In conclusion, the
13 Appellant submits that the mitigation outweighs the aggravating factors.

14 **RESPONDENT'S SUBMISSIONS**

15 20. The Respondent's submissions can be taken quite shortly.

16 21. The Magistrate took the appropriate starting point and made a 25% discount for the
17 plea of guilty. The sentence of 6 years is in keeping with the relevant authorities which
18 mandate a deterrent sentence for dealers of cocaine. The Magistrate took into account
19 all the relevant factors when coming to her decision and did not err in finding that the
20 mitigating and aggravating factors balanced themselves out.



1 **DECISION**

2 22. The grounds on which the court can allow an appeal are:

- 3 a. a wrong factual basis not justified in law;
- 4 b. matters improperly taken into account;
- 5 c. new factual matters that have subsequently arisen or
- 6 d. that the sentence was manifestly excessive or wrong in principle.



7 23. The Learned Magistrate conducted a structured sentencing exercise.

8 24. At paragraph 5 of the sentencing notes, the Magistrate determined that the Appellant
9 fell somewhere between a leading and significant role - although more of a significant
10 role. There was, from the evidence, expectations of significant financial gain. The
11 Appellant was clearly in charge of her “game”, aware of the market, had her sources of
12 supply and distribution, and was supplying directly to users. On this basis the
13 Magistrate took the starting point of 8 years. As already noted, there is no complaint
14 about this.

15 25. At paragraph 6, the Magistrate set out the aggravating factors.

16 *“I have considered the aggravating factors in this case – the offence was*
17 *committed whilst on bail – bail given even after she had absconded on an earlier*
18 *charge. I also accept that there were attempts to conceal when the police raided*
19 *her home. She was doing her operations with her children in the home. She was*
20 *aware of purity. The use of cocaine and ganja is prevalent and destroys lives in*
21 *our society. That is why our legislators have imposed such heavy penalties.*
22 *Penalties known to the defendant as seen in her phone records, as she was not*
23 *going to risk for “money that ain’t worth it”*”

24

25 26. The Magistrate went on to set out the mitigating factors from Paragraph 7 onwards.

1 27. Originally, Counsel for the Appellant had taken objection to the reference to drugs
2 being prevalent in the Cayman Islands as being an impermissible aggravating factor.
3 The Court indicated that it did not understand the Magistrate to be counting the
4 reference to be an aggravating factor, but, rather, it was an explanation for why the
5 legislation provided for heavy penalties. The point was accordingly withdrawn by
6 Counsel for the Appellant.

7 28. The references to knowledge of purity and knowledge of the penalties are cause for
8 concern.

9 29. Counsel for the Respondent sought to explain the references as relating to the
10 Appellant's sophistication as a drugs dealer and thus not being treated as aggravating
11 factors. However, Counsel conceded that the Magistrate had already dealt with the
12 level of sophistication when the starting point was calculated. Perhaps the Magistrate
13 did not mean to treat these as aggravating factors but her remarks were made under the
14 findings of aggravating factors. This Court cannot speculate as to what the remarks
15 meant. Where there is ambiguity or uncertainty, it should be resolved in favour of the
16 Appellant.

17 30. It is to be noted that high purity of drugs is a recognised aggravating factor in the UK.
18 Analysis of the relevant drugs is therefore customary in the UK. Analysis of drugs is
19 not done in the Cayman Islands. It seems to me therefore that in the absence of
20 scientific analysis of the drugs which were recovered, it would be inappropriate to
21 penalise the Appellant. She might have been told the drugs were high purity, when in
22 fact they were not. Alternatively, as suggested by Counsel for the Appellant, her
23 references to purity in the messages to potential buyers may have been in order to
24 make a sale. That cannot be an uncommon occurrence.



1 31. As regards, the Appellant knowing the penalties for drugs offences: This is not
2 featured on the list of aggravating factors for drugs offences and it is difficult to see
3 why it should aggravate the offence. In the court's judgment, the Magistrate erred in
4 referring to these features under the umbrella of aggravating factors.

5 32. There is one other small matter relating to aggravating factors. The Magistrate referred
6 to the Appellant doing her operations with her children at home. The Court checked
7 with Counsel on both sides and it was agreed that there was no evidence of the
8 Appellant supplying from her home. It was accepted however, that the fact of drugs
9 being on the premises where the children lived is an aggravating factor.

10 33. When dealing with mitigation, in paragraph 9, the Magistrate quoted from an extract
11 from Dr Lambert. It was an important extract as it was relevant to culpability.
12 However, the Magistrate did not indicate what the relevance was of the extract - unlike
13 the extracts quoted from the SIR, which led the Magistrate to consider that the
14 Appellant was a calculating person. The same exercise should have been applied to the
15 extract of Dr Lambert to understand what conclusion the Magistrate drew from it and
16 why she quoted it.

17 34. The court has a more up-to-date report from Dr Lambert. Although containing much of
18 the same information as the report prepared for the lower court, Dr Lambert has seen
19 the Appellant since her sentence and thus provides an update. He provides a clearer
20 exposition of his strong opinion as to the Appellant's responsibility, by reference to her
21 previous history.

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